

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 08-05

April 17, 2008

TO: All Division Heads, Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Report on the Midwinter Meeting of the ABA Practice and Procedure
Committee of the Labor and Employment Law Section

The Board and I attended the Annual Midwinter meeting of the Practice and Procedure Committee (P & P Committee) of the ABA of the Labor and Employment Law Section from February 20 through 23, 2008. The primary purpose of this meeting is to discuss and respond to Committee concerns and questions about Agency casehandling processes. As is the practice, I provided responses to questions that the Committee had submitted earlier in the year. It is important that you and your staffs be aware of the concerns of the organized bar at the National level and of my thinking on these issues, so as I have done in the past, I am sharing my responses with you.

While the primary purpose of the meeting is to deal with the institutional concerns of the P&P Committee, this meeting also provides an opportunity for individual practitioners to communicate their thoughts about the operations of the Office of the General Counsel and the Field operations in particular. Consistent with my experience in the Mid-Winter meetings conducted in 2006 and 2007, I was very gratified by the positive comments of the practitioners at the meeting concerning the professionalism and dedication of the Agency staff with whom they regularly deal. These comments serve to confirm the assessments of the work of the staffs in the Field and Headquarters I have gained through casehandling and performance reviews. They reinforce my pride in serving with you. Thank you all for all of your fine efforts.

The attached summarizes our responses to the Committee.

/s/
R.M.

Attachment

cc: NLRBU

Release to the Public

What is the Board's policy regarding coordination between Regions when a similar or identical charge is filed in two Regions? The question arose from a facility on the Indiana-Illinois border. A charge was filed in Region 25 and dismissed. A second charge was filed in Region 13 which conducted its own investigation although aware that the charge had been previously dismissed. There are reports that this happens in other regions as well.

The General Counsel coordinates the investigation and prosecution of charges under the authority granted in 29 U.S.C. §153(a). Under the General Counsel's authority the Associate General Counsel of the Division of Operations-Management is responsible for coordinating the processing of unfair labor practice charges in the Regions. Outstanding instructions are that upon the docketing of a charge, our CATS database of cases is queried for current and recent case filings involving the employers and/or labor organizations involved. That information is then provided to the Assistant to the Regional Director and included in the investigative file.

The Division of Operations-Management is to be notified of the filing of multiple charges by the same party or against the same party alleging similar violations in multiple Regions. However, a charged or charging party can, and often does, directly request that the General Counsel coordinate the processing of multiple and similar charges filed *or to be filed* in various Regional Offices. Operations-Management identifies which unfair labor practice charges require national coordination by reviewing the number of charges filed, the allegations raised in the charges, and the nationwide impact of the resolution of those charges. Generally, Operations-Management selects a Region to serve as the lead Region for the coordination. In choosing a lead Region, Operations will consider, among other factors, the resources available in the Regions, the geographic location of the parties and the likely witnesses and the current status of the charges. Often, a manager in the Division will work with the Director in the lead Region in the effort to coordinate the processing of the cases. In some situations, the cases may be submitted to the Division of Advice for casehandling direction. Memoranda listing all currently coordinated cases are issued by Operations on a twice yearly basis.

It is the policy of the Office of the General Counsel that when one Region has investigated and dismissed a charge allegation, another Region will, in the absence of newly discovered evidence, not reinvestigate and issue complaint on the same allegation. We looked into the Region 25- Region 13 matter raised by this question and can advise that this policy was followed and that there were no duplicative investigations.

Questions were raised about the standards used when deferring cases. How many deferrals are made annually? What progress has been made in connection with the OIG March 2004 review of the Collyer deferral process?

In FY 2007 there were 22,663 unfair labor practice charges filed. Of these, 2092 cases resulted in deferrals under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and

196 were deferred under *Dubo Manufacturing Corp.*, 142 NLRB 431 (1963). In total, 2288 cases or about 10% of all unfair labor practice charges were deferred. The percentage of unfair labor practice cases deferred each year is relatively consistent, ranging from 10 to 12%.

The inventory of deferred cases has been reduced dramatically since 2002, when the General Counsel began addressing the growing inventory of cases pending deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971). When we began our 2002 initiative with respect to the *Collyer* backlog, there were 4526 cases pending *Collyer* deferral. Within one year this number was reduced to approximately 3900. Thereafter the number of cases removed from the *Collyer* inventory was over 800 in 2003, around 700 in 2004, and close to 700 in 2005. The current inventory of all *Collyer* deferrals is 2441.

Regions have implemented regular systems to monitor the status of all deferred cases. They require the parties to provide information regarding the status of deferred cases every 90 days. Regional decisions to continue to hold cases in deferral or to resume processing are based on the responses or lack of responses to these inquiries. The recommendations made in 2004 by the Inspector General in "Review of the Collyer Deferral Process" were consistent with the General Counsel's initiatives described here.

Four different Regional meetings raised a variety of issues about the use of these [investigative] subpoenas. We would appreciate a report on the most up-to-date data available on the use of these subpoenas. Other issues raised included frequency of use, practice regarding giving the parties notice of third party subpoenas, questions about investigative subpoenas issued to rank-and-file (non-management) employees who later are represented by the employer's outside counsel, and could an employer offer to represent employees in responding to an investigative subpoenas be an unfair labor practice. How much time will a party be given to produce documents voluntarily before an investigative subpoena is used, and must a request for providing documents voluntarily precede subpoenas.

a. Experience

A similar question was asked in 2007. During fiscal year 2007 Regional Directors issued investigative subpoenas in 482 cases or 2.2% of the total unfair labor practice case intake of 22,321 during the year. In 57% of the cases in which the Region issued an investigative subpoena merit was found in the case and in 43% no-merit was found.

Over the last 6 years, the percentage of cases filed in which investigative subpoenas have been issued ranged from .9 to 2.2% and the annual merit rate of the cases in which subpoenas issued ranged from 57 to 67%. The number of petitions to revoke ranged from 26 to 50 and the percentage of petitions to revoke that were granted, in whole or in part, ranged from 2 to 11.4%.

b. Notice of Third Party Subpoena

There is no practice of giving parties notice of third-party subpoenas. In conformance with Sec. 11842.3 of the Unfair Labor Practice Casehandling Manual, if a person is known to be represented by an attorney, then Regions are required to give that attorney a copy of the subpoena.

c. Representation of the Third Parties

Sec. 10058.4(d) of the Unfair Labor Practice Casehandling Manual sets forth procedures for Board agents to follow when party counsel (employer or union) claims to represent a third-party witness in an individual capacity. The Manual advises that both the attorney and the witness should be directed to provide written notice that the attorney represents the witness. If the Region is satisfied that there is a consensual attorney-client relationship, that the attorney has not violated the employee witness' Section 7 rights, and that the presence of the attorney would not impede the investigation, then the Region in its discretion may decide to interview the witness, but it can only do so with the attorney present. And any future contacts with that witness must proceed through his or her attorney. If, on the other hand, the Region decides not to conduct the interview, Counsel can take his or her own statement and submit it to the Region.

d. Employer Offers of Representation to Employee Witnesses

An employer's offer to provide representation to a rank-and-file employee fact witness responding to an investigative subpoena could constitute an unfair labor practice. In S.E. Nichols, Inc., 284 NLRB 556, 559 n.9 (1987), the Board affirmed the ALJ's decision that the employer violated Sec. 8(a)(1) of the Act by offering its own attorney to nonsupervisory employees who had received investigatory subpoenas in connection with a charge filed against the employer. See also KFMB Stations, Inc., 349 NLRB No. 38, p. 1 (2007). Obviously, these are matters that would have to be investigated before any definitive answer can be given.

e. Submission of Evidence

As provided in Sec. 11770.2 of the Unfair Labor Practice Casehandling Manual, a Regional Director has the discretion to issue an investigative subpoena when the evidence sought cannot be obtained by reasonable voluntary means. Thus, an investigative subpoena generally is not utilized when the same evidence can be obtained voluntarily. A party should be provided reasonable time to provide documents voluntarily before an investigative subpoena issues. What is reasonable will depend on an array of factors, including, inter alia, the type and number of documents sought, the parties' history in cooperating in current and past investigations, whether there is a need for the discipline of the subpoena process in the presentation of evidence and the nature of the issues presented in the charge. Thus, there is no incentive for the General Counsel to issue investigative subpoenas when evidence can be obtained voluntarily.

The meetings expressed a consistent interest in the most up-to-date data available on Section 10(j) injunctions as well as any developments.

Fiscal Year 2007

In FY 2007, the Injunction Litigation Branch received 68 10(j) submissions from the Regions as compared to 69 cases received in FY 2006. In FY07, the General Counsel requested Section 10(j) relief in 39 cases, or 58% of the submissions, compared to 30 cases, or 43% in FY 2006. The Board decided 28 cases in FY 2007. It authorized Section 10(j) proceedings in 25 cases, the same number as it authorized in FY 2006. The Board denied only three Section 10(j) requests in FY 2007; it denied none in FY 2006. The remaining eleven cases submitted to the Board in FY 2007 were either withdrawn, usually due to settlement, or were pending at the end of the fiscal year. The litigation success rate for FY2007 — post-authorization settlements and court wins — was 82%.

In FY 2007, the Board filed a total of 20 Section 10(j) petitions. All of these were filed against employers. Five cases authorized in a prior fiscal year were also pending in district court at the beginning of the fiscal year. Of these 25 cases, six were settled or adjusted prior to court action, and one case was withdrawn prior to a court decision as moot due to the issuance of a Board order. District courts granted injunctions in eight cases, granted partial injunctions in two cases, and denied injunctions in three cases. Five cases remained pending in district court at the end of the fiscal year.

Of the 13 cases litigated to decision in FY 2007, four cases involved employer withdrawals of recognition from incumbent unions. Two cases involved successor employers' refusal to recognize and bargain with the incumbent union that had represented the employees of the predecessor employer. Three cases in FY 2007 involved employer conduct designed to undermine the status of incumbent unions; two cases involved employer misconduct during bargaining negotiations and the creation of alter ego entities to avoid a bargaining obligation. Finally, one case involved the discharge of a union activist during an organizing campaign, and another case involved the discharge of 20 employees who engaged in protected, concerted activity.

Fiscal Year 2008

Between October and December 2007 the Injunction Litigation Branch received 25 regional submissions, of which five were submitted to the Board for authorization. The Board authorized Section 10(j) proceedings in three cases and denied none. To date, none of these authorized cases has settled or been adjudicated.

On December 28, 2007, the Board temporarily delegated its Section 10(j) authority to the General Counsel in anticipation of a lack of a three-member quorum in January. A similar delegation in 2001 was approved in Kentov v. Point Blank Body Armor, 258 F.Supp.2d 1325 (S.D. Fla, 2002).

From January to the date of the meeting, the General Counsel authorized six Section 10(j) cases. Of these cases, several resulted in district court orders, several settled and one was pending.

A great deal of discussion and desire for information concerned the Board's recent decisions involving remedies for discriminatees, the shifting of burdens of proof and/or production involved in calculating and awarding back pay, and the manner in which the Regions will investigate and process these case. Participants were interested in how these cases will be investigated and processed.

The General Counsel Guideline Memorandum on *Oil Capital* (OM 08-29) and *Toering Electric* (GS 08-04) issued just before the meeting. We advised the participants of this and that these memos answered many of the questions they had raised. We also advised that the Compliance Manual is currently being revised due to the Board's decisions in *Oil Capitol Sheet Metal*, *Toering Electric*, *St. George Warehouse* and *Grosvenor Resort*.

We know that the Casehandling Manual was revised to deal with this perennial [Skip Counsel] problem, but inconsistencies among Regions continue to be reported. We would appreciate a report on the Agency's experience with the new provisions of the Manual as well as what steps the Agency is taking to ensure compliance with the procedures set forth in the Manual.

We described the procedures we have taken to prevent instances of "skip counsel". In addition to the instructions in the Casehandling Manual, the General Counsel initiated training sessions for Field offices. This training was presented by Special Ethics Counsel and provided information to assist Board agents in identifying and avoiding potential skip counsel issues.

The Casehandling Manual instructs the Regions when to call headquarters for ethics advice concerning skip counsel issues. Although most states have adopted either the 1995 or 2002 version of the ABA's Model Rule 4.2, they have sometimes done so with modifications. As a result, state interpretations of Rule 4.2 continue to vary. Thus, what may appear to be inconsistencies among Regions may in fact be due to differing state rules and requirements, and not a failure by Board agents to follow outstanding instructions.

Several of the Regions discussed cases that the General Counsel has expressed interest in such as (1) "nip in the bud" cases which arise at the beginning of organizing activity; (2) first year bargaining cases (including information request cases in surface bargaining situations); (3) consideration of electronic remedial notices; (4) the experience with the General Counsel's memos on special remedies. We would be interested in hearing the Agency's thought with respect to these issues.

The initiatives on "nip in the bud" cases and cases involving violations during bargaining for a first contract are discussed in two GC Memoranda, GC 06-05 (April 19, 2006) and GC 07-08 (May 29, 2007). These initiatives are two-pronged: (1) to review the propriety of §10(j) relief in all cases involving violations during an organizing drive or

during bargaining for a first contract and (2) to consider whether remedies in addition to the standard remedies are appropriate to restore the status quo in the first contract bargaining cases.

In GC 07-08, we specifically focused on considering the appropriateness of four possible remedies in bargaining cases: prescribed or compressed bargaining schedules; reports to the Regional Director on the status of bargaining; minimum six month extension of the certification year and reimbursement of bargaining costs. In assessing the propriety of seeking any of these remedies, the General Counsel has urged a focus, not on the egregiousness of the violations, per se, but on the impact of the violations on the exercise of rights protected under the Act, including the establishment of new collective-bargaining relationships.

It is still too early in the litigation process to assess the ultimate result of these initiatives. Our rough figures indicate that in the 20 months through December 31, 2007, approximately 115 organizing cases and at least 125 "initial contract" bad faith bargaining cases were submitted to Advice for §10(j) and/or remedy review. While we have not completed our review of these cases in detail, we can report that we have found it appropriate to seek prescribed bargaining schedules in several cases, including two cases in which we sought §10(j) authorization for such relief. We have also sought bargaining expenses in two cases; although both those cases settled without that remedy being secured. We have not authorized any cases seeking reports to Regional Directors except in recidivist situations. We expect that the charging party will bring to our attention complaints of failure to comply with bargaining orders. Finally, Regions continue to seek an extension of the certification year for a minimum of six months in appropriate cases. In cases involving organizing violations that have had a particularly deleterious impact on employee free choice, we have also authorized seeking other remedies such as notice reading or special access remedies designed to ameliorate the damage done by the violations.

In addition, other remedial initiatives are proceeding. In GC 07-07 (May 2, 2007) Regions were directed to seek to have interest compounded quarterly for monetary awards. Cases raising this issue are in various stages of the litigation pipeline: two are pending before the Board at this time. Regions have also been looking at electronic posting remedies pursuant to GC 06-82 (August 15, 2006), in which Regions were directed to investigate whether and how respondents regularly communicate with employees by email or other electronic means and, in appropriate cases, to specifically plead the remedy in a complaint. Regions have been successful in obtaining electronic posting remedies in the settlement of approximately 50 cases; the issue has been litigated in a handful of cases.

We continue to hear questions in many of the meetings concerning submissions to the Office of Advice. Questions included notice to the parties, mandatory submissions, and the appropriate way to communicate during the process. While this has been discussed before, it continues to be an issue, and the thought is to discuss how to better disseminate appropriate information to practitioners.

Further, we would appreciate knowing the General Counsel's standards for disclosure of advice memos in closed cases.

Pursuant to standard Agency procedure, Regional offices inform parties when they submit cases to Advice and, where cases involve multiple allegations, the specific issues on which they are seeking advice. There are, of course, certain types of cases and issues which must be submitted to Advice, and these are set forth in Memorandum GC 07-11 (posted on the Agency's website). When resolving issues submitted by a Region, Advice may identify a concern not previously addressed in a party's position statement or affidavit and, in such circumstances, routinely makes sure the party is contacted to address that concern prior to reaching a conclusion. Parties are free to contact Advice.

Pursuant to the Supreme Court's decision in Sears, all Advice memos authorizing the dismissal of charge allegations, absent withdrawal, are subject to disclosure under FOIA. Current practice is to post them on the Agency's website about two weeks after their issuance. Advice memos authorizing issuance of complaint, absent settlement, are internal Agency work product and, as such, typically are not disclosed. After a case is closed, the General Counsel as a matter of discretion may disclose a redacted version of an Advice memo in the case. In that event, the memo is also posted on the Agency website.

What authority and means does a Regional Director have to require a party to an R-case who is requesting a hearing to identify the issues that he or she intends to raise prior to a hearing so the other party can prepare?

If the parties are cooperating, there will be a full discussion and disclosure of the issues as the Board agent discusses an election agreement with the parties. Generally, the issues will have been fully explored before the date of the hearing.

There is no requirement that a party identify in advance the unit issues to be investigated at a representation hearing. However, as explained more fully in Section 11188.1 of the Representation Casehandling Manual, it is the duty of the hearing officer to ensure that a full record is developed, which includes narrowing the issues warranting record testimony. Failure to cooperate will unduly delay the hearing adding to the cost of the government and the client. Moreover, if a party refuses to cooperate, there is a risk that a full record will not be made and the position advocated by a party could fail.

Even if no party raises an issue in dispute prior to the hearing, in the absence of a stipulation, a hearing must be convened and a party has a right to raise an issue there and introduce evidence, *Barre National, Inc.*, 316 NLRB 877 (1995). Of course, under *Bennett Industries*, 313 NLRB 1363 (1994), if a party refuses to state a position on an issue, then no controversy exists as to that issue and the party should be advised that it may be precluded from presenting evidence on the issue.

Several regions raised issues regarding the use of mail ballots. What is the current practice in the Regions for determining whether to conduct a mail ballot election, and what procedures apply to such election? We would also appreciate general data on mail ballots, e.g. how many requested, conducted, under what circumstances, what is the voter turn out, election results, how often are objections filed, elections rerun?

The current practice for determining whether to conduct a mail ballot election is set forth in Casehandling Manual, Part II, Section 11302.1. Generally, where circumstances would make it difficult for eligible voters to vote in a manual election, the Regional Director may use his/her discretion to conduct a mail ballot election or an election with a combination of mail and manual ballots. The following factors are taken into consideration when deciding to use mail ballots:

(a) where eligible voters are “scattered” because of their job duties over a wide geographic area,

(b) where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and

(c) where there is a strike, a lockout or picketing in progress.

If any of the foregoing situations exist, the Regional Director considers the desires of all the parties, the likely ability of voters to read and understand mail ballots and the availability of addresses for employees. The Regional Director will also consider the efficient use of the Agency’s financial resources, although mail ballot elections should not be directed based solely on budgetary concerns. Under extraordinary circumstances, other relevant factors may also be considered by the Regional Director. *San Diego Gas & Electric*, 325 NLRB 1143 (1998).

The procedures for conducting mail ballot elections are fully discussed in the Casehandling Manual at Section 11336.

During the 2 year period January 1, 2006 through December 31, 2007, approximately 4,305 elections were conducted. Of those elections, approximately 240 were conducted by mail ballot or were mixed manual/mail ballot elections.

Only 13 of the 240 mail ballot elections during the sample period were conducted by direction of the Regional Director, and in most of those circumstances the parties had left it up to the Director to decide how the election would be conducted. In one case, however, the employer filed a special appeal with the Board over the Director’s decision to conduct the election by mail ballot. The Board denied the appeal.

There were approximately 280,295 employees eligible to vote in the elections (manual or mail) conducted in the sample two-year period. Approximately 224,247 or 80% of the eligible voters cast ballots in those elections. The voting rate in manual

elections alone was 81.57% and in mail or mixed manual /mail, the rate was approximately 65%.

Of the 240 mail ballot elections conducted, certifications of representative issued in 177 and certifications of results issued in 57 of them. Four petitions were withdrawn before final action was taken in those cases, one is currently pending before the Board on objections and one is pending hearing on objections. Objections were filed in 15 of the 240 mail ballot elections. There were four rerun elections conducted during the sample period involving mail ballot elections.

What has been the experience with the General Counsel's outreach to the community program? How many regions have or plan to put out newsletters, what is the impact on agency resources, and what has been the response?

The Program is working very well. During fiscal year 2007, Board agents participated in over 450 outreach events and provided information about our Agency to over 30,000 stakeholders. A significant number of these events were attended by very large crowds, such as the Government on Display at the Mall of America, Cincinnati Latino Festival, Indianapolis' Black Expo and FIESTA, and a webcast to all ALCOA U.S. facilities.

A review of the Agency's outreach events for fiscal year 2007 shows that 40% were in educational settings, such as high schools and universities; 17% were community based, such as speaking at legal aid clinics, labor alliance committee on minority affairs, women's law center, tribal employment rights organization, or local NAACP chapters; 16% were Bar Association related; 14% involved labor organizations; 8% involved employer and management groups, such as SHRM; and 5% were geared toward other governmental entities.

Regions have stepped up efforts to coordinate joint informational events with EEOC, DOL, OSHA and other federal agencies, which has resulted in a number of successful programs across the nation. Our Board agents also have gone to other agencies to act as information officers for their counterparts to better assist the latter when referring members of the public. Further, some outreach coordinators have sought and obtained agreements with other agencies to place links to the NLRB website in the respective agencies' websites.

In addition to face-to-face contact, the Agency has utilized other forums to enhance its outreach program by: providing interviews on public access television and radio regarding recent case developments; producing an English/Spanish video about our Agency and representation case processing that is currently in the editing phase; publishing Regional newsletters; responding to more than 75,000 telephonic inquiries about workplace issues; and re-structuring its Internet website to be more user-friendly.

As part of the Internet website re-vamping, the Agency has posted outreach materials and more foreign language publications, has provided more information about

protected concerted activities and about other federal and state agencies, and has included a Speakers Bureau so that members of the public can easily request a speaker. Through the Speakers Bureau, the Agency has received requests for speakers from as far away as Dubai, and as diverse as from government officials in Shenzhen, China. Many individuals have commented that they would not have contacted the Agency if not for access through the Speakers Bureau.

Currently, there are 17 Regions that issue newsletters and they will continue to do so on a periodic basis during this fiscal year. Further, most, if not all, of the remaining Regions, intend on publishing local newsletters this fiscal year. All newsletters are posted on the Agency website under the header entitled About Us.

Regions have received very positive feedback from their constituents about their respective newsletters. Not only do they apprise the public of recent case activity on the national and local level, but they are also a window into the unique personalities of each regional office.

All Regional outreach coordinators and the two national coordinators from Headquarters participate in quarterly telephone conference calls to discuss creative and innovative approaches to promote better awareness of the Act, particularly to reach out to community based groups to inform them concerning the protections afforded by the Act to protected concerted activities. These quarterly conferences also serve to apprise the Regional outreach coordinators of upcoming outreach events and the General Counsel initiatives.

Questions were raised about the discoverability of email correspondence between an Agency attorney and a party attorney. Does the Board have a policy on the preservation and disclosure of email communications?

Regional Office casehandling practice requires that if an e-mail pertains to the investigation or processing of a specific case, the document must be printed and placed in the case file. When printing the e-mail, it is critical that, along with the printed text, the printed document captures the names of the sender and the recipients and the dates of transmission and receipt. In this regard, if the e-mail is sent to a mailing list that does not display the names of the actual recipients, the names of those on the mailing list must also be printed. After printing this information and placing the documents in the official case file (or other appropriate storage location for non-casehandling matters), the electronic document should be deleted unless there is a litigation hold or some specific reason to keep it.

When a litigation hold issues, electronic information and records must be preserved by the Agency. The litigation hold supersedes Agency retention rules that would otherwise allow routine deletion of certain electronic information and records. It will also require preserving electronic information and records that could have been, but were not, deleted under the Agency's record retention rules prior to the litigation hold.

E-mail messages must be placed in a special location where they will be secure from any routine e-mail deletion protocols.

Our policy regarding disclosure of e-mail communications is governed by the FOIA and the Federal Rules of Civil Procedure when we are litigating a case in court.

During the discussion period, one of the attorneys present advised that he had been told by Board agents in two different Regions that those Regions would not, under any circumstances accept a stipulation for an election more than 42 days after the petition was filed.

We advised the inquiring attorney and the others present that this was absolutely not Agency policy. Regional performance is measured in median days in order to give the Regions the flexibility to meet our goals and still accommodate the legitimate needs of the parties. We also told the group, however, that Regions would not and should not accept dates outside the 42-day goal without good cause.